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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 761

WILLIS W. RITTER, Chief Judge, United States District Court for the District of Utah, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIS W. RITTER, Chief Judge, United States District Court for the District of Utah, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on December 8, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals (Tr. 75-79;* Appendix A, *infra*, pp. 1a-4a) is reported at 273 F. 2d 30.

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* All "Tr." references are to the typewritten record of the present mandamus proceeding (No. 6238, C.A. 10).

The first opinion of the Court of Appeals in the underlying litigation is reported at 220 F. 2d 666. The opinion of this Court reversing the Court of Appeals on the issue of liability and remanding the case for further findings on the issue of damages is reported at 351 U.S. 173. The second opinion of the Court of Appeals in the underlying litigation (Tr. 14-20), following a second trial pursuant to this Court's remand, is reported at 257 F. 2d 920.

JURISDICTION

The judgment of the court below (Tr. 80; Appendix B, *infra*, page 4a) was entered on December 8, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTION PRESENTED

Whether a Court of Appeals may, by mandamus, order the disqualification of a regularly appointed and assigned District Judge, on the basis of his alleged bias and prejudice in a particular case, and assign another judge in his place, despite the fact that no affidavit of bias and prejudice has been filed by any of the parties to the case.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix C, *infra*, pp. 4a-5a.

STATEMENT

This is a sequel to *Hatahley* v. *United States*, 351 U.S. 173, where this Court held the United States liable for depredations committed by its agents against the persons and livestock of a small band of Navajo Indians in the southeastern portion of the State of Utah. The essential facts are set forth at 351 U.S. at 174-177. Those pertinent to the present proceeding may be summarized as follows:

Hatahley *et als.*, Navajo Indians, brought suit under the Federal Tort Claims Act for damages resulting from the

wrongful taking and destruction of some 140 of their horses and burros by agents of the Bureau of Land Management, and for their mental pain and suffering. Trial before petitioner in the United States District Court for the District of Utah resulted in judgment for the plaintiffs in the sum of $100,000. On appeal, the Tenth Circuit reversed, directing entry of judgment for the United States on the ground that, by reason of asserted compliance with the Utah abandoned horse statute, the United States had incurred no liability in consequence of its agents' spoliation of the Indians. 220 F. 2d 666.

This Court granted certiorari (350 U.S. 817), after which the United States argued (U.S. Br., No. 231, Oct. T. 1955, pp. 14-20) that "The Court of Appeals correctly regarded the findings and decision of the District Court as being influenced by an unwarranted attitude of hostility to the Government's case."

This Court rejected that contention, saying (351 U.S. at 177, note 3):

> "While the Government does not challenge particular findings, it does level a general charge that the trial was conducted in such an atmosphere of bias and prejudice that no factual conclusions of the court should be relied on. The Court of Appeals noted 'that the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality.' 220 F. 2d at 670. After oral argument and a thorough consideration of the record, however, we do not find that the trial was conducted so improperly as to vitiate these findings. See *Labor Board* v. *Donnelly Co.*, 330 U.S. 219, 236-237."

On the issue of liability, this Court reversed the Tenth Circuit, holding that the United States was liable for the torts of its agents; the case was remanded to the District Court for adequate and appropriate findings to permit proper apportionment of the lump sum judgment (351 U.S. at 182).

On such remand, the District Court took additional evidence on damages, made further detailed findings, and entered individual judgments, aggregating $186,017.50, in favor of the several plaintiffs. Again the United States appealed; again the Tenth Circuit reversed, this time remanding for a new trial, limited to the issue of damages, consistent with the opinion then rendered, 257 F. 2d 920. That opinion (Tr. 20; 257 F. 2d at 926) concluded by saying, "we suggest that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge." Certiorari was again sought; this time it was denied (358 U.S. 899; No. 420, Oct. T. 1958).

Thereafter, Hatahley *et als.*, plaintiffs, filed in the District Court a petition for the appointment of a special master (Tr. 33-37). The Government filed two motions, one (Tr. 23) asking that all further proceedings be heard before another judge, the other (Tr. 24) requesting the entry of an amended judgment (Tr. 25-26) that provided for the transfer of the case to another judge.

A hearing on all three applications was held on June 26, 1959 (Tr. 39-53). On August 24, 1959, petitioner denied the plaintiffs' petition (R. 38), and on September 10, 1959, petitioner denied both of the Government's motions (R. 27, 28).

Thereafter, on October 2, 1959, the United States filed in the Tenth Circuit a petition for writ of mandamus or prohibition (Tr. 4-13), duly accompanied by an application for leave to file (Tr. 2-3); the relief sought (Tr. 12-13) was that—

> "Chief Judge Willis W. Ritter be compelled to set aside his orders of September 10, 1959, denying the motion that all further proceedings be heard before another judge and denying the motion for entry of a judgment on the mandate; that a stay issue pro-

> hibiting him from setting the case for retrial before himself or under his control pending determination of this petition; and that he be directed to enter appropriate orders 'to the end that further proceedings in the case be had before another Judge,' "

citing *United States* v. *Hatahley*, 257 F. 2d at 926 (C.A. 10).

On December 8, 1959, the Tenth Circuit granted the mandamus, (Tr. 75-79), and directed that the *Hatahley* case "be heard before a judge to be designated by the Chief Judge of this Circuit, pursuant to Section 292(b), Title 28 U.S.C., and that the respondent take no further action herein" (Tr. 79). Judgment (Tr. 80) was entered accordingly.

The same four Circuit Judges who had heard the mandamus argued in the United States Court of Appeals for the Tenth Circuit (Tr. 74) assembled on the afternoon of that same day, following the argument, as the Judicial Council of the Tenth Circuit (Tr. 82). Sitting as such Judicial Council, the same judges considered all of the documents that had earlier that day been before them as the United States Court of Appeals (Tr. 82-83). On the same day that the Court of Appeals issued its opinion and judgment, viz., December 8, 1959, the Judicial Council made findings that petitioner was prejudiced in favor of the plaintiffs in *Hatahley et als.* v. *United States* and that "the effective and expeditious administration of the business" of the United States District Court for the District of Utah required that petitioner proceed no further in that case (Tr. 83).

The Judicial Council, purporting to act under 28 U.S.C. § 332, ordered petitioner to proceed no further in the *Hatahley* case, and then requested one of its members, Chief Judge Murrah of the Court of Appeals, to designate another judge to hear the case (Tr. 83-84).

Meanwhile, on the day before, December 7, 1959, Chief Judge Murrah had already assigned District Judge Kerr

of the United States District Court for the District of Wyoming to hear the *Hatahley* case. A copy of this order, separately certified, has been filed with the Clerk of this Court.

The orders of the Tenth Circuit and of the Judicial Council were both stayed until February 6, 1960 (Tr. 80, 85). After further stays were denied, Mr. Justice Whittaker on February 25, 1960, stayed all further proceedings in *Hatahley* v. *United States*, conditioned on the filing of a petition for certiorari in the present case on or before March 7, 1960.

This is that petition for a writ of certiorari, to review the judgment of the United States Court of Appeals in *United States* v. *Ritter*.

A motion for leave to file a petition for a common law writ of certiorari or in the alternative for a writ of mandamus, and a petition for a common law writ of certiorari or in the alternative for a writ of mandamus, are being filed contemporaneously herewith to review the order of the Judicial Council.

REASONS FOR GRANTING THE WRIT

When and how an appellate court may properly control the conduct of a trial judge through the use of the truly extraordinary writ of mandamus is obviously a question of continuing importance in the administration of justice. Numerous rulings here indicate that mandamus against a sitting judge is to be sparingly employed, not only because that writ has "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him" (*Ex parte Fahey*, 332 U. S. 258, 260), but also because the issuance of that writ strikes at the basic federal policy of not permitting piecemeal appeals. Indeed, to the extent that Congress in 1958 ameliorated that policy to allow certain interlocutory appeals in a narrow class of cases and

under rigid restrictions, see 28 U.S.C. § 1292(b), the prior limited scope for mandamus against a judge was necessarily limited still further. Yet the court below, in an action literally without precedent, has sharply curtailed the traditional and indeed constitutionally guaranteed independence of a United States District Judge within his own district, and in the court wherein he was Chief Judge. We submit that its action should be reviewed by this Court.

First. No case of which we are aware even remotely authorizes a court of appeals to disqualify a trial judge in a situation such as this one. Certainly *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, on which the Tenth Circuit relied (Tr. 77, 78), did not go so far. There the district judge had abdicated his functions to a master, in the face of the Seventh Circuit's frequent disapproval of such a practice (see 352 U.S. at 258), in disregard of Rule 53(b), F. R. Civ. P., and contrary to this Court's condemnation in *Los Angeles Brush Co.* v. *James*, 272 U.S. 701, and in *McCullough* v. *Cosgrave*, 309 U.S. 634. Here, however, petitioner denied the Indian plaintiffs' application for reference to a master (Tr. 38), and, far from abdicating his functions, was preparing to act.

And, unlike *Cooke* v. *United States*, 267 U.S. 517, and *Offutt* v. *United States*, 348 U.S. 11—also relied upon by the court below (Tr. 20; 257 F. 2d at 926)—the present case involved no question of contempt, where the trial judge's vindication of the affront to his court might be thought to lessen his objectivity. The same factor—"that in sitting in judgment * * * the judge should not himself give vent to personal spleen or respond to a personal grievance" (*Offutt* v. *United States*, 348 U.S. at 14) was in substance present in *Calvaresi* v. *United States*, 348 U.S. 961, reversing 216 F. 2d 891 (C. A. 10), where this Court remanded the cases "for retrial before a different judge." The opinion below in that case plainly discloses those circumstances. (We reject, emphatically, the Gov-

ernment's all but *ad hominem* suggestion (Tr. 72) that the *per curiam* in *Calvaresi* is only to be read as applying to "other cases originally tried by Judge Ritter"—the present petitioner.)

Nor is this case like *Johnson* v. *Manhattan R. Co.*, 289 U.S. 479, where the Court's suggestion (289 U.S. at 505) that Senior Circuit Judge Manton withdraw from a receivership pending in a District Court was thereafter followed by an order of the Circuit Justice (Mr. Justice Stone) enjoining him from acting further. See 49 Law Library J. 6, note 36, ¶ (b). For while Judge Manton was virtually an interloper brushing aside one of the rules of the court in which he assigned himself to sit, this petitioner is a United States District Judge for the District of Utah by Presidential appointment, duly confirmed by the Senate, and now Senior Judge in that district by virtue of 28 U.S.C. § 136.

Second. The statutes governing the disqualification of sitting judges are explicit. Any party to a proceeding in a district court may by "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias of prejudice against him or in favor of any adverse party" (28 U.S.C. § 144; *infra*, p. 4a) disqualify the sitting judge. And the sitting judge is directed by 28 U.S.C. § 455 (*infra*, p. 5a) to recuse himself in specified instances. No other authority exists for disqualifying a district judge. No authority for effecting such disqualification can be spelled out of the very specific statutory jurisdiction conferred on courts of appeals (28 U.S.C. §§ 1291, 1292, 2106), and none, we submit, can be found in the "all writs" provision, now 28 U.S.C. § 1651(a), *infra*, p. 5a.

If a party seeking to remove a judge from further participation in a particular cause lacks the facts—or the fortitude—to file a sufficient affidavit of prejudice under the statute specially designed for such removal, it should not be permitted to achieve the same result through like

allegations in unsworn briefs, much less in similarly unsworn applications for mandamus which short-circuit normal appellate processes.

For the rest, the tenure of a United States District Judge is one for life, subject only to the constitutional standard of good behavior (Art. III, Sec. 1). That is a standard to be judged only by the Senate sitting as a Court of Impeachment (Art. I, Sec. 3), not by a court of appeals.

Third. It is significant that when the court below, on the second appeal in the *Hatahley* case, commented adversely on petitioner's conduct, it referred only to incidents at the first trial, which were considered by this Court on the merits, and which were held by this Court not to warrant the Government's stricture of "being influenced by an unwarranted attitude of hostility to the Government's case." See 357 U.S. at 177, note 3, quoted *supra*, p. 3. On the second appeal, the court below referred to no single instance from the second record, indeed to no single word from that source, to justify its suggestion that a judge whose conduct had been specifically approved by this Court as not improper should thereafter step aside. Thus the Court of Appeals was in substance overruling and reversing this Court's determination, made in 1956, that petitioner's conduct of the original trial was not improper.

Here is the pertinent extract from the opinion of the court below on the second appeal (Tr. 19-20; 257 F. 2d at 925-926); the bracketed references are to the record of the first hearing, where this Court reversed the Tenth Circuit's reversal of petitioner's original ruling (No. 231, Oct. T. 1955):

> "A casual reading of the two records leaves no room for doubt that the District Judge was incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other Indians in southeastern Utah by the government agents and white ranchers in their attempt to force

the Indians onto established reservations. This was climaxed by the range clearance program, with instances of brutal handling and slaughter of their livestock, which the Court, during trial, referred to as 'horrible' [1R. 223], 'monstrous' [1R. 223, 226], 'atrocious' [1R. 326], 'cruel' [1R. 222], 'coldblooded depredation' [1R. 226], and 'without a sense of decency' [1R. 222]. The Court firmly believed that the Indians were being wrongfully driven from their ancestral homes, and suggested Presidential [1R. 223, 418] and Congressional [1R. 225-226] investigations to determine their aboriginal rights. He threatened to conduct such an investigation himself [1R. 83-85, 276-277, 418]. A public appeal on behalf of the plaintiffs was made for funds and supplies to be cleared through the Judge's chambers [1R. 224, 246-247, 277-278, 281].[6] From his obvious interest in the case, illustrated by conduct and statements made throughout the trial, which need not be detailed further, we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside."

[6] [Footnote in original] The allowance of $395.00 per head for the Indian horses and burros, and $3,500.00 for mental pain and suffering for their loss, is of itself an indication of the desire of the presiding Judge to assist the plaintiffs for the different wrongs which they had suffered.

If, as the foregoing footnote from the second *Hatahley* opinion appears to indicate, petitioner's award of heavy damages for the unconscionable depredation inflicted on the Indians by the Government's agents reflects such partiality as to justify disqualifying him, by writ of mandamus, from further participation in the case, then by parity of reasoning those judges of the court below who on the first appeal held the United States free from all liability for its authorized representatives' spoliation of the Indian plaintiffs would seem to be similarly disqualified from taking any further action in any phase of the still pending *Hatahley* litigation.

Fourth. The clearest indication that the Tenth Circuit felt doubts as to its power in the premises is found in the circumstance that, although four judges sat en banc to issue the order now sought to be reviewed, the same four judges immediately after hearing arguments on the petition for writ of mandamus convened themselves as a Judicial Council to repeat in different fashion the same direction to petitioner that he disqualify himself.

Since, as we show in the Petition for a common law Writ of Certiorari or in the alternative for a Writ of Mandamus, which is filed simultaneously to review the order of the Judicial Council, that order was utterly devoid of statutory sanction, it can only be concluded that the same judges sitting as the United States Court of Appeals for the Tenth Circuit doubted their unaided power, in that incarnation, to effect the order of disqualification now in question.

CONCLUSION

The order under review strikes at the very heart of orderly judicial administration. This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

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MARCH 1960.

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 6238

UNITED STATES OF AMERICA, *Petitioner*,

v.

HONORABLE WILLIS W. RITTER, Chief Judge, United States District Court for District of Utah, *Respondent*.

Memorandum and Order

(December 8, 1959)

Before MURRAH, Chief Judge, and PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

This matter comes on for consideration upon application of the United States to set aside an order of the respondent, Honorable Willis W. Ritter, in Civil No. C 36-53, entitled Bill Hatahley, et al. v. United States of America, in which the court denied petitioner's motion that all further proceedings in that case be heard before another judge, and for an entry of a judgment on the mandate from this court. The application also seeks to prohibit the respondent from setting the principal case for retrial before himself.

The respondent, although having been duly served with notice, has filed no response and did not appear either in person or by counsel. However, the interested parties in the principal case have filed a response in opposition to the relief sought and appeared by counsel in support of same.

When the case was first here in United States of America v. Hatahley, et al., 220 F. 2d 666, we observed that it had been "tried in an atmosphere of maximum emotion and a minimum of judicial impartiality." But on certiorari the Supreme Court did not think that "the trial was conducted so improperly as to vitiate" the trial court's findings. On the second appeal after retrial, limited to the issue of damages, we again observed that "a casual reading of the two records leaves no room for doubt that the district judge was incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other Indians • • • "; that "From his obvious interest in the case, illustrated by conduct and statements made throughout the trial • • • we are certain that the feeling of the presiding judge is such that, upon retrial he cannot give the calm impartial consideration which is necessary for a fair disposition of this unfortunate matter and he should step aside." We accordingly suggested that when the case was remanded to the district court, the trial judge should "take appropriate preliminary steps to the end that further proceedings in the case be had before another judge," citing La Buy v. Howes Leather Co., 352 U.S. 249. The suggestion was made in the exercise of appellate supervisory control and in the interest of proper judicial administration.

After denial of certiorari (358 U.S. 899) the mandate filed December 12, 1958, reversed the case for a new trial as to damages only, and carried forward our suggestions that further proceedings be had before another judge. But on the assumption that in these circumstances formal action would be unnecessary, we refrained from entering a formal order directing that the case be heard before another judge.

No further action was taken after the mandate in December 1958 until the matter came on for hearing in June 1959 on application of the plaintiffs for the appointment of a

special master or commission of special masters to determine the damages. The United States thereupon filed this motion for the entry of an amended judgment and trial before another judge. At the hearing of these motions, the trial court took note of our suggestions that the case be heard before another judge, but stated for the record that he did not "intend to follow that suggestion so you can lay that to one side." After reserving a ruling on all motions, the trial court on August 26, 1959, entered an order denying the plaintiff's motion for the appointment of a special master or commission of special masters, and on the following September 10, entered an order denying the defendant's motion for an amended judgment and trial before another judge.

Plaintiffs in the principal case take the position that the government's application is premature and untimely, and that in any event, extraordinary relief is unauthorized either under the all-writ statute, Section 1651, Title 28 U.S.C., or appellate supervisory control of the district courts. But we have no doubt of our power and inescapable duty to grant the relief sought, whether it be found in the all-writ statute or in the exercise of the inherent powers of appellate jurisdiction to effectuate what seems to us to be the manifest ends of justice. **See La Buy v. Howes** Leather Co., supra.

In view of the whole record before this court, we are convinced that the United States cannot obtain a fair and impartial trial before the presently presiding judge, and that the proper administration of justice requires that further proceedings in the case be heard before another judge. And, it now conclusively appears that the said respondent judge will not heed the court's suggestions that he take proper steps to excuse himself and reassign the case. It is therefore ordered that further proceedings in this case be heard before a judge to be designated by the Chief Judge of this Circuit, pursuant to Section 292(b), Title 28 U.S.C., and that the respondent take no further

action herein. And, the Clerk of this Court is directed to forthwith transmit a copy of this Memorandum and Order to the Clerk of the District Court of Utah, and the Clerk of that Court is directed to file same.

APPENDIX B

JUDGMENT BELOW

Judgment

Fourteenth Day, November Term, Tuesday, December 8th, 1959.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the application for leave to file petition for writ of mandamus or prohibition and was argued by counsel.

On consideration whereof, it is now here ordered that further proceedings in this case be heard before a judge to be designated by the Chief Judge of this Circuit, pursuant to Section 292(b), Title 28 U.S.C., and that the respondent take no further action herein. And, the Clerk of this Court is directed to forthwith transmit a copy of this Memorandum and Order to the Clerk of the District Court of Utah, and the Clerk of that Court is directed to file same.

APPENDIX C

STATUTES INVOLVED

The provisions of Title 28, United States Code, directly involved are as follows:

"§ 144. Bias or prejudice of judge

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

* * * * * *

"§ 455. Interest of justice or judge

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

* * * * * *

"§ 1651. Writs

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

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No. 761 and No. 823, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIS W. RITTER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
PETITIONER

v.

UNITED STATES OF AMERICA

WILLIS W. RITTER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
PETITIONER

v.

THE HONORABLE ALFRED P. MURRAH, CHIEF JUDGE, THE HONORABLE JOHN C. PICKETT, CIRCUIT JUDGE, THE HONORABLE DAVID T. LEWIS, CIRCUIT JUDGE, AND THE HONORABLE JEAN S. BREITENSTEIN, CIRCUIT JUDGE, CONSTITUTING THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND ON MOTION FOR LEAVE TO FILE AND PETITION FOR WRIT OF CERTIORARI OR ALTERNATIVELY FOR WRIT OF MANDAMUS, TO THE CIRCUIT JUDGES CONSTITUTING THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 761

WILLIS W. RITTER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 823, Misc.

WILLIS W. RITTER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, PETITIONER

v.

THE HONORABLE ALFRED P. MURRAH, CHIEF JUDGE, THE HONORABLE JOHN C. PICKETT, CIRCUIT JUDGE, THE HONORABLE DAVID T. LEWIS, CIRCUIT JUDGE, AND THE HONORABLE JEAN S. BREITENSTEIN, CIRCUIT JUDGE, CONSTITUTING THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION [1]

The question presented by this case is whether a court of appeals, having determined that a district

[1] Pursuant to a request issued through Chief Judge Alfred P. Murrah, the undersigned counsel represent the Judges

judge is not capable of conducting "a fair and impartial trial" of a particular cause and that "the proper administration of justice requires that further proceedings in the case be heard before another judge", has the supervisory power to direct that such further proceedings "be heard before a judge to be designated by the Chief Judge" of the Circuit (Pet., No. 761, p. 3a). In our view, the decisions of this Court plainly show that such power resides in the courts of appeals and there is accordingly no occasion for review by this Court. If, as we believe, there is no serious question on this score, the question raised in No. 823, Misc.—whether the Judicial Council of the Circuit acted within its powers when it confirmed this disposition and entered a similar order—becomes wholly academic.

The history of the proceedings in this case may be briefly summarized:

(1) Eight families of Navajo Indians brought suit in the United States District Court for the District of Utah claiming damages under the Federal Tort Claims Act for destruction of their horses by agents of the Federal Government. The District Court (Chief Judge Ritter) held the United States liable and allowed damages of $100,000. On appeal, the Court of Appeals reversed (220 F. 2d 666) on the ground that the Utah abandoned horse statute (Utah

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constituting the Judicial Council of the Tenth Circuit of the United States, named as respondents in No. 823, Misc., as well as the United States of America, respondent in No. 761.

Code Ann., 1953, 47-2) was properly invoked by the government agents. This Court granted certiorari and reversed the Court of Appeals' holding that the United States was not liable. *Hatahley* v. *United States*, 351 U. S. 173. In its opinion, this Court stated (p. 182), with reference to damages, that the District Court had "merely awarded the amount prayed for in the complaint" and that the findings were "totally inadequate for review." The case was accordingly remanded to the District Court.

(2) Following remand, a further hearing took place before Judge Ritter. Testimony was presented and findings of fact and conclusions of law were entered. The court, on this occasion, awarded damages aggregating approximately $186,000. The United States appealed, contending that numerous errors had been committed, that it had not been accorded a fair and impartial consideration of the issue of damages, and that the case should be remanded for a new trial before a different judge. The Court of Appeals, considering the case *en banc*, unanimously found that the award was not justified by the evidence and findings, and it directed a new trial on the question of damages. 257 F. 2d 920. In its opinion, the court stated (p. 926):

> * * * From his obvious interest in the case, illustrated by conduct and statements made throughout the trial, which need not be detailed further, we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration

which is necessary for a fair disposition of this unfortunate matter, and he should step aside.

* * * * *

Somewhat in analogy to the procedure outlined in Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767, and Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11, we suggest that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge. See La Buy v. Howes Leather Co., 352 U.S. 249, 259, 77 S.Ct. 309, 1 L. Ed. 2d 290.

A petition for certiorari was filed by the plaintiffs in which the first question presented was whether, in the circumstances, the Court of Appeals "was justified in directing the district judge to withdraw from the case" (Pet., No. 420, Oct. Term, 1958, p. 2). This Court denied the writ, 358 U. S. 899.

(3) Upon remand of the case for the second time, the plaintiffs petitioned for appointment of a special master (or a commission of special masters). The United States opposed this request and moved Judge Ritter to transfer the proceedings to another judge. Judge Ritter denied both the petition for reference to a special master and the Government's motion for the transfer of the cause to another judge.

(4) The Government thereupon applied to the Court of Appeals for a writ of mandamus or prohibition. The case was again heard *en banc* and again decided unanimously. The opinion stated (Pet., No. 761, pp. 3a-4a):

> In view of the whole record before this court, we are convinced that the United States cannot obtain a fair and impartial trial before the presently presiding judge, and that the proper administration of justice requires that further proceedings in the case be heard before another judge. And, it now conclusively appears that the said respondent judge will not heed the court's suggestions that he take proper steps to excuse himself and reassign the case. It is therefore ordered that further proceedings in this case be heard before a judge to be designated by the Chief Judge of this Circuit, pursuant to Section 292(b), Title 28 U.S.C., and that the respondent take no further action herein. * * *

Immediately after consideration by the Court of Appeals, the matter was further considered by the Judicial Council of the Tenth Circuit, convened pursuant to 28 U. S. C. 332.[2] The order of the Council found (Pet., No. 823, Misc., p. 2a) that Judge Ritter has "such bias and prejudice * * * that he should proceed no further" in the case, and that the "effective and expeditious administration of the business" of the District Court requires that the matter be heard by another judge. The order of the Council directs (*id.*, p. 3a) that Judge Ritter proceed no further in the case, and it requests the Chief Judge of

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[2] That provision states in pertinent part:

"* * * Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

the Circuit to designate and assign another judge from the District Court's bench.

The applications now before this Court challenge the actions taken by the Court of Appeals and by the Judicial Council.

The writ of mandamus is, of course, the historic means by which an appellate court compels compliance with its directions. *United States* v. *Fossatt*, 21 How. 445, 446; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255-256; *In re Potts, Petitioner*, 166 U.S. 263, 265; *Ex parte The Union Steamboat Company*, 178 U.S. 317, 318-319.[3] In a previous application for certiorari, denied in the 1958 Term, petitioners challenged the Court of Appeals' conclusion that the case could not be heard impartially by Judge Ritter and that he should withdraw. Certainly, there is no occasion for this Court to review, at this time, the record which convinced the judges of the Court of Appeals that the proper administration of justice would be served by transfer of the case to another judge. Nor can there be the slightest room for doubt that a determination of this kind is within the supervisory powers of the appellate courts of the United

[3] Courts of appeals have similarly exercised this power. *Osage Oil & Refining Co.* v. *Continental Oil Co.*, 34 F. 2d 585, 587-588 (C.A. 10); *In re N. V. Zuid-Hollandsche Scheepvaart, Etc.*, 64 F. 2d 915 (C.A. 5); *In re Chicago, R. I. & P. Ry. Co.*, 162 F. 2d 257, 258 (C.A. 7); *Federal Home Loan Bank of San Francisco* v. *Hall*, 225 F. 2d 349, 385-386 (C.A. 9), certiorari denied *sub nom. Mallonee et al.* v. *Federal Home Loan Bank of San Francisco et al.*, 350 U.S. 968; *United States* v. *United States District Court*, 272 Fed. 611, 614-615 (C.A. 9).

States. In *Calvaresi* v. *United States*, 348 U. S. 961, and *Smaldone* v. *United States*, 348 U. S. 961, cases which involved a claim by criminal defendants that the District Judge had shown himself incapable of conducting their trials impartially, this Court entered a *per curiam* order reading as follows: "In the interests of justice and in the exercise of the supervisory powers of this Court, certiorari is granted and the cases are severally reversed and remanded to the District Court for retrial before a different judge." See, also, *Cooke* v. *United States*, 267 U. S. 517; *Offutt* v. *United States*, 348 U. S. 11. It needs no argument that the courts of appeals, which have the primary responsibility for reviewing the conduct of proceedings in the district courts, have supervisory powers of equal breadth.

Since we believe it clear under settled principles that the Court of Appeals acted within the range of its powers and responsibilities, there is no occasion for considering the prerogatives of the Judicial Council or the modes by which review of its orders might be sought. The order of the Judicial Council required no more than what was already required by the order of the Court of Appeals. We note additionally our belief that the Judicial Council's order in this case falls squarely within its statutory authority (28 U.S.C. 332) to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." As we show in the Appendix, *infra*, by pertinent excerpts from the legislative history, Congress conferred upon the

Judicial Council of each circuit extensive supervisory powers in such matters as the assignment of judges.

The petition in No. 761 and the application in No. 823, Misc., should be denied.

Respectfully submitted,

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APRIL 1960.

APPENDIX

The legislative history of the bills (S. 188, H.R. 2973 and H.R. 5999, 76th Cong., 1st Sess. (1939)) which resulted in the statute upon which 28 U.S.C. 332 is based, includes the following material:

Chief Judge Groner stated (Hearings, Subcommittee of the Committee on the Judiciary, United States Senate, 76th Cong., 1st Sess. (1939), on S. 188, pp. 11, 14):

> Under the present judicial set-up we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which he may be responsible.
>
> The bill also provides what is not now true, that it shall be the duty of the district judges, when admonished or when matters otherwise brought to his attention by the judicial council, to take whatever steps are thought to be necessary *or declared to be necessary* to correct those things which ought to not exist in a well-run judicial system.
>
> * * * *
>
> I know that it may be said to be an acknowledgement by the courts of the necessity of which I spoke in the beginning of my remarks, the duty and responsibility upon themselves of protecting themselves against the criticism or against those things which produce criticism. To that extent, it impinges upon what in the very beginning of things was considered to be the independence of

> the courts. At the present time a circuit judge or district judge is responsible to his conscience. *This bill does impose some sort of instrumentality whereby, if his conscience is not sufficiently quickened, it may be quickened by some action on the part of the judicial council.*
>
> It is not, I think, an unfair or an unwise impingement on the independence of the courts. I think the very necessities of the the work, the strengthening of confidence on the part of the people is the first essential, and anything which properly provides for and leads to the accomplishment of that purpose, I am for. I think it goes far enough and not too far in that direction. * * * [1]

The Honorable Arthur T. Vanderbilt, referred to as the "former President of the American Bar Association and President of the American Judicature Society", stated at those same hearings (*id.* p. 16):

> Secondly, I would like to point out that the present bill has a great advantage over the bill that was introduced last year, and for that I think the credit must go to the Chief Justice and the other members of the Supreme Court, in that it does not attempt to centralize all the business affairs of the Federal courts in Washington, but rather creates a system of decentralization in *recognizing the circuit courts of appeals*, 11 of them, including the Court of Appeals of the District of Columbia, *as the operating units in bringing about the proper administration of justice.* This bill has at least that very great advantage that, the circuit judges being responsible for the con-

[1] Emphasis here, and elsewhere in this Appendix, has been supplied.

> dition of the district courts within the circuits, have it within their power to know much more about what is going on in that circuit than could the Chief Justice or the Associate Justices of the Supreme Court here at Washington. I think the principle or example set there is one which is very important and will be very helpful in the administration of the bill.

Mr. Vanderbilt expressed the view that the bill "does have teeth in it" (*ibid.*, p. 18). In discussing the power to assign judges from another district, Mr. Vanderbilt stated (p. 19):

> If a judge having assistance given him will not work, *and will not respect the admonition of the circuit judges*, then something else will have to be done. Those cases are so rare that I do not think you [members of a committee of Congress] will ever have to bother with them.

The Honorable Kimbrough Stone, Senior Circuit Judge, Eighth Judicial Circuit, also made a statement in which he noted the "necessity of some authority" in the circuit judges adequate to supervise the district judges, and he apparently thought that the bill under consideration would supply the need. *Id*, p. 26.

Similarly, Judge Alexander Holtzoff, then Special Assistant to the Attorney General, noted at the Senate hearings (p. 36):

> This bill will create an administrative machinery composed of two parts. First, it proposes to establish an administrative office in Washington, with a director in charge who will devote his entire time to administrative work, to gathering information in the States, formu-

lating suggestions as to improving the efficiency of the courts, and devising ways and means for expediting disposition of the cases on the dockets. He is not clothed with any authority to give any directions to the judges. All he can and must do is to gather information and formulate suggestions. *The governing body under this bill will be the judicial council in each circuit,* and for that purpose the District of Columbia is a circuit. The judicial council is composed of the circuit judges of each circuit. The director is to submit quarterly reports to each judicial council, *which can take such action as appears to be necessary.*

There is a mandatory clause in the bill requiring the district judges to accept and follow the directions of the judicial council. To this extent they are responsible for the administrative side of the Federal judiciary *and for dispatching the work of the courts in a businesslike manner and expediting the decision of cases.*

Thus, while the work of the director is administrative in nature, the judicial council "can take such action as appears to be necessary". *Ibid.*

Representative Walter Chandler of Tennessee, a member of the House Committee on the Judiciary, stated, *inter alia*, 84 Cong. Rec., pt. 9, p. 9310 (1939):

Another purpose of the bill is to secure an improved supervision of the work of the Federal courts through an organization under judicial control [i.e., the Judicial Council]. The data assembled by the director and submitted quarterly to the courts of appeals is the subject of study by a council of judges in each circuit

to be held semiannually, and directions are to be given to the district judges "as to the administration of the business of their respective courts."

After pointing out how the bill will produce more efficient and economical administration of justice and how the plan has worked elsewhere, Mr. Chandler concluded as follows (*id.*):

> *To those who have expressed apprehension "as to the safety of entrusting great powers to isolated judges, subject to no check except appeal according to law, and subject to suspicion in spite of good conduct and wise decisions," this bill should be a welcome answer.* Indeed, it is my own hope that, out of the investigations of the administrative office, and the deliberations of the conferences provided for in the bill, there will arise the sense of unfailing obligation resting on our judiciary to promote and abide by the highest ethical standards of which the bench and bar of America are capable, and as are reflected in the established canons of judicial and professional ethics.

In view of petitioner's inclusion of remarks by the late Honorable John J. Parker, Senior Judge, United States Court of Appeals for the Fourth Circuit (No. 823, Misc. Pet. 9-10), we invite attention to additional statements by Judge Parker. Thus, he thought that the formation of the judicial councils would give the directions of the senior circuit judge serving as chief judge much greater force and effect. He stated (Hearings, House Judiciary Committee, 76th Cong., 1st Sess. (1939), on H.R. 2973 and H.R. 5999, p. 21): "In other words, you would have a man speaking with authority of law and not merely exercising

his personal and persuasive influence." Judge Parker went on to state, in language which is particularly pertinent with respect to the instant petitions (*id.*):

> I think that that provision for a council in each circuit is one of the best provisions in the bill, in that it will centralize the responsibility in the circuit judges, and will give the circuit judges the power to utilize the judicial man power on each circuit to the best advantage.
>
> The senior circuit judge now has the power to assign judges from one district to another within his circuit. He would never fail to exercise that power, if a council of his brethren advised him that it should be exercised to relieve the conditions in a particular district.

Further contrasting the existing situation with that which would exist after enactment of the bill, Judge Parker stated (*id.*):

> * * * We have given to the Circuit Court of Appeals supervisory power over the decisions of the district judges, but we have given them no power whatever over administration by the district judges.
>
> If Judge Jones decides a case contrary to the views of the majority of the Circuit Court of Appeals, we can tell him so and reverse him. But if he holds a case under advisement for 2 years, instead of deciding it promptly, there is nothing that we are authorized by the law to do about it in the absence of an application for mandamus. Now, *this authorizes us to do something about it*; and I agree with you that something ought to be done about it.

Nor did Judge Parker think the council was limited to questions of delay. After noting that the council would see to it that "the cases are promptly decided", he went on to state (*id.*): "* * * and not only that, but they [the council] are going to tell the judges, or give the judges advice, about other matters that we could not foresee to legislate about in this bill." Judge Parker also expressed the view that "This counsel [council] can deal with *all sorts of questions* that arise in the administration of justice." (*Id.*, at p. 22).

The following colloquy then appears (*id.*):

> Mr. Celler. Do you put any restraint on the council at all?
>
> Judge Parker. I do not think this bill does. Of course, I assume this is true: That the council will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter.
>
> The Chairman [Representative Hatton W. Sumners of Texas]. Then you are limited by what you can do to a judge in the way of punishment?
>
> Judge Parker. Absolutely, Mr. Chairman.
>
> The Chairman. There is another method of getting things over among people by advice and suggestion; in other words, you are a part of the family, for instance.

It is at this point that the excerpt which the petitioner quotes appears (No. 823, Misc., Pet. 9-10).

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